[ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2006]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-5064, 05-5095 through 05-5116
KHALED A.F. AL ODAH, *et al.*,
Plaintiffs-Petitioners-Appellees/Cross-Appellants,
v.
UNITED STATES OF AMERICA, *et. al.*,
Defendants-Respondents-Appellants/Cross-Appellees.

No. 05-5062 and consolidated case 05-5116
LAKHDAR BOUMEDIENE, et al.,
Plaintiffs-Petitioners-Appellees/Cross-Appellants,
v.
UNITED STATES OF AMERICA, *et. al.*,
Defendants-Respondents-Appellants/Cross-Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* SENATOR CARL LEVIN IN SUPPORT OF PETITIONERS REGARDING SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005

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Dated: March 10, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the District Court and/or in this Court on these appeals are listed in the Opening Briefs of the Government in *Al-Odah* v. *United States*, Nos. 05-5064, 05-5095 through 05-5116, and of the Petitioners in *Boumediene* v. *Bush*, Nos. 05-5062 and 05-5063:

Amici Curiae British and American Habeas Scholars.

Amicus Curiae World Organization for Human Rights USA in Support of Petitioners in *Al-Odah v. United States*.

Amicus Curiae Washington Legal Foundation.

Amici Curiae Senators Lindsey Graham and Jon Kyl.

B. Rulings Under Review

References to the rulings at issue appear in the Opening Briefs of the Government in *Al-Odah* v. *United States* and of the Petitioners in *Boumediene* v. *Bush*.

C. Related Cases

The Opening Briefs of the Government in *Al-Odah* v. *United States* and of the Petitioners in *Boumediene* v. *Bush* indicate which of the cases on review were previously before this Court and identify the names and numbers of related cases pending in this Court or in the District Court.

Philip Allen Lacovara

Dated: March 10, 2006

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* Authorities upon which this brief chiefly relies are marked with an asterisk.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae is Senator Carl Levin of Michigan.[1] Senator Levin is the ranking Democrat on the Senate Armed Services Committee. Senator Levin co-sponsored the "Graham-Levin amendment" (sometimes called the "Graham-Levin-Kyl amendment") that eventually became Section 1005 of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005) ("DTA") and is the central statutory provision before the Court. Senator Levin has a direct interest in the proper understanding of the Amendment and in an accurate understanding of its history.

DISCUSSION

THE DRAFTING HISTORY OF THE DTA CONFIRMS WHAT THE PLAIN TEXT AND STRUCTURE DEMONSTRATE: CONGRESS DID NOT INTEND SUBSECTION 1005(e)(1) TO APPLY TO PENDING CASES

Several of the briefs submitted to this Court cite statements made by Members of Congress, including Senator Levin, out of context in an effort to argue that Congress intended Section 1005 to strip the courts of jurisdiction over detainee cases already brought and pending in the courts. E.g., Gov't Br. at 41-42; Br. of *Amici Curiae* Senators Graham and Kyl at 11. In fact, this view was not expressed

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[1] Consistent with Circuit Rule 29, Senator Levin has obtained consent to file this brief from the parties.

by any Member of Congress prior to the final action on the Conference Report containing Section 1005 on December 21, 2005.

The after-the-fact statements of Members of Congress regarding the intention of legislation cannot change the legislative history that existed at the time Congress acted on a piece of legislation. Rather, legislation must be understood in light of the language of the law itself, the changes that were made to that law as it went through the drafting process, and what was clearly stated *before* the legislation was adopted. See *Doe v. Chao*, 540 U.S. 614, 626-27 (2004); *Tax Analysts* v. *I.R.S.*, 350 F.3d 100, 104 (D.C. Cir. 2003) (citing *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 13 (1980) ("[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.")); *North Broward Hosp. Dist.* v. *Shalala*, 172 F.3d 90, 98 (D.C. Cir. 1999) (collecting cases in which the Supreme Court has observed that subsequent legislative history is "an unreliable guide to legislative intent").

In this case, the legislative history of Section 1005 supports the plain meaning of the statute: this provision was not intended to strip the courts of jurisdiction over pending cases. In fact, the amendment was modified during its

consideration in the Senate, and it was modified for the precise purpose of ensuring that pending litigation could continue.

The earliest version of the proposed Section 1005—the "Graham-Kyl-Chambliss amendment"—had two provisions: (1) it eliminated habeas jurisdiction for Guantanamo detainees, and (2) it granted to this Court "exclusive jurisdiction" to review Combatant Status Review Tribunals (CSRTs). See 151 Cong. Rec. S12655 (Nov. 10, 2005) (S. Amdt. 2515). Of particular importance, this first version of the language specified that both provisions applied to any action "pending on or after the date of the enactment of this Act." *Id.*

Senator Levin opposed the Graham-Kyl-Chambliss amendment on the ground (among others) that "[i]t would eliminate the jurisdiction already accepted by the Supreme Court in *Hamdan*." 151 Cong. Rec. S12664 (Nov. 10, 2005). The Senate passed that language by a 49-42 vote on November 10, 2005, with Senator Levin voting "no." See 151 Cong. Rec. S12667 (Nov. 10, 2005).[2]

The language applying habeas restrictions to pending cases, however, was soon removed from the bill by an amendment offered jointly by Senators Graham and Levin on November 14, 2005. This new version of the provision, which

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[2] The amendment passed by the Senate was Amendment No. 2516, a version offered by Senator Graham the relevant provisions of which were identical to Amendment No. 2515.

completely replaced the Graham-Kyl-Chambliss amendment, became known as the Graham-Levin-Kyl amendment.

The Graham-Levin amendment changed the language of the effective date provision. This revision eliminated the language in the predecessor version that had applied the jurisdiction-stripping provisions to "pending" habeas cases and provided instead that the amendment as a whole "shall take effect on the day after the date of the enactment of this Act." 151 Cong. Rec. S12752 (Nov. 14, 2005) (S. Amdt. 2524 § (e)(1)).

In his remarks on the Graham-Levin amendment, Senator Graham did not address the issue of the effect of the amendment on pending cases before yielding the floor to Senator Levin, who did address the issue.

Senator Levin explained on the floor that the Graham-Levin amendment before the Senate would address the "problem * * * with the first Graham amendment": namely, that it "would have stripped all the courts, including the Supreme Court, of jurisdiction over pending cases." 151 Cong. Rec. S12755 (Nov. 14, 2005). Senator Levin stated that the substitute "amendment will not strip the courts of jurisdiction over those cases. For instance, the Supreme Court jurisdiction in *Hamdan* is not affected." *Id.* Senator Levin reiterated the point only moments later: "[I]t would not strip courts of jurisdiction over these matters

where they have taken jurisdiction * * * . [I]t does not strip the courts of jurisdiction." *Id.*

Senator Graham took the floor again immediately after Senator Levin had concluded his explanation of what the new amendment would accomplish. In his remarks, Senator Graham did not disagree with Senator Levin's statement about the effect of the revised amendment on the pending cases.

The next day, November 15, 2005, the Senate adopted the Graham-Levin amendment by a vote of 84-14. See 151 Cong. Rec. S12803 (Nov. 15, 2005). At that time, Senator Levin again explained the change from the Graham-Kyl-Chambliss amendment to the Graham-Levin-Kyl amendment:

> "The habeas prohibition in the Graham amendment applied retroactively to all pending cases—this would have the effect of stripping the Federal courts, including the Supreme Court, of jurisdiction over all pending case[s], including the *Hamdan* case.
>
> "The Graham-Levin-Kyl amendment *would not apply the habeas prohibition in paragraph (1) to pending cases*.
>
> * * *
>
> "The approach in this amendment preserves comity between the judiciary and legislative branches. It avoids repeating the unfortunate precedent in *Ex parte McCardle*, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court." 151 Cong. Rec. S12802 (Nov. 15, 2005) (emphasis added).

Senator Harry Reid, who co-sponsored the Graham-Levin-Kyl amendment, supported this explanation of the amendment:

> "As a supporter of the Graham-Levin[-Kyl] amendment, let me state my understanding of several important issues. First, I agree with Senator Levin that his amendment does not divest the Supreme Court of jurisdiction to hear the pending case of *Hamdan* v. *Rumsfeld*. I believe the effective date provision of the amendment is properly understood to leave pending Supreme Court cases unaffected. It would be highly irregular for the Congress to interfere in the work of the Supreme Court in this fashion, and the amendment should not be read to do so." 151 Cong. Rec. 12803 (Nov. 15, 2005).

No Senator expressed a contrary view.

The bill then proceeded to Conference. During the Conference, the Administration tried to alter the effective date provision to restore the language stripping the courts of jurisdiction over pending cases. See 151 Cong. Rec. S14258 (Dec. 21, 2005). A House proposal embodied the Administration effort. See *id.* But the Conference rejected that language and retained the effective date language from the Graham-Levin-Kyl amendment.

Senator Levin explained this history when the Senate adopted the conference report on December 21, 2005:

> "Under the Supreme Court's ruling in *Lindh* v. *Murphy*, 521 U.S. 320, the fact that *Congress has chosen not to apply the habeas-stripping provision to pending cases* means that the courts retain jurisdiction to consider these appeals. * * * [T]he Senate voted affirmatively to

> remove language from the original Graham amendment that would have applied this provision to pending cases. The conference report retains the same effective date as the Senate bill, thereby adopting the Senate position that *this provision will not strip the courts of jurisdiction in pending cases*." 151 Cong. Rec. S14257 (emphasis added).

Senator Levin's summary of the drafting history of the amendment in his December 21, 2005, statement describes the evolution of the DTA and, specifically, the issue of the non-application of the jurisdiction-stripping provision to pending cases:

> "I opposed the initial amendment addressing the legal rights of Department of Defense detainees at Guantanamo Bay, Cuba when Senator Graham offered it to the Senate floor, because it would have stripped federal courts of jurisdiction to hear habeas corpus challenges—including pending cases—brought by Guantanamo detainees. Unfortunately, the Senate approved that amendment by a 49-to-42 vote.
>
> "Following the Senate vote, I worked with Senator Graham to build back protection into his amendment. We did so in three ways:
>
> "First, the jurisdiction-stripping provision in the initial Graham amendment would have applied retroactively to all pending cases in Federal court—stripping the Federal courts of jurisdiction to consider pending cases, including the *Hamdan* case now pending in the Supreme Court. *The revised amendment adopted by the Senate—the so-called Graham-Levin-Kyl amendment—does not apply to or alter any habeas case pending in the courts at the time of enactment.*
>
> * * *

"Let me be specific.

"The original Graham amendment approved by the Senate contained language stating that the habeas-stripping provision 'shall apply to any application or other action that is pending on or after the date of the enactment of this Act.' We objected to this language and it was not included in the Senate passed bill.

"An early draft of the Graham-Levin-Kyl amendment contained language stating that the habeas-stripping provision 'shall apply to any application or other action that is pending on or after the date of the enactment of this Act, except that the Supreme Court of the United States shall have jurisdiction to determine the lawfulness of the removal, pursuant to such amendment, of its jurisdiction to hear any case in which certiorari has been granted as of such date.' We objected to this language and it was not included in the Senate-passed bill.

"A House proposal during the conference contained language stating that the habeas-stripping provision 'shall apply to any application or other action that is pending on or after the date of enactment of this Act.' We objected to this language and it was not included in the conference report.

"Rather, the conference report states that the provision 'shall take effect on the date of the enactment of this Act.' These words have their ordinary meaning—that the provision is prospective in its application, and does not apply to pending cases. By taking this position, we preserve the comity between the judicial and legislative branches and avoid repeating the unfortunate precedent in *Ex parte McCardle*, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court." 151 Cong. Rec. S14257-58 (Dec. 21, 2005) (emphasis added).

Some of the briefs cite Senator Levin's statements out of context, in an effort to argue that Subsection 1005(e)(1) applies to pending habeas cases and that detainee cases already brought and pending elsewhere "can no longer proceed under habeas or other fonts of jurisdiction." Br. of *Amici Curiae* Senators Graham and Kyl at 11. The Government's brief (at 41-42) goes so far as to assert that during the floor debate on November 14, "Senator Levin articulated precisely the position that [the Government] urge[s] here." That is not so.

As just discussed, the legislative history demonstrates that Subsection 1005(e)(1) does not apply and was not intended to apply to pending cases. Senator Levin stated plainly that the compromise amendment "would not strip courts of jurisdiction over these matters where they have taken jurisdiction," and explained specifically that under the compromise amendment, "[f]or instance, the Supreme Court jurisdiction in *Hamdan* is not affected." 151 Cong. Rec. S12755 (Nov. 14, 2005). That would not be true if Subsection 1005(e)(1) applied to pending cases.

No Member of Congress expressed a contrary view prior to the final action on the Conference Report containing Section 1005.

Any post-hoc statements cannot change the contemporaneous understanding of the intent of the legislation. As Senator Levin pointed out in his recent February 14, 2006, statement:

> "I do not believe that the unexpressed intentions or after-the-fact statements of Senators—Senator Kyl, myself, or

> anyone else—can change the facts or the legislative history that existed at the time Congress acted on a piece of legislation. The relevant considerations are the language of the law itself, the changes that were made to that law as it went through the drafting process, and what was clearly stated before the bill was voted on by the Senate." 152 Cong. Rec. S1170 (Feb. 14, 2006).

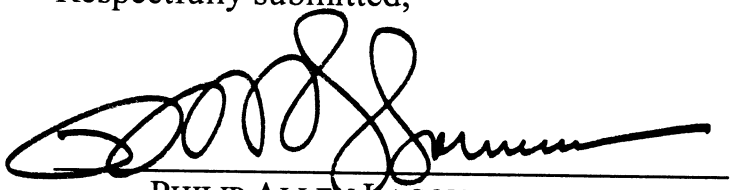
The statutory text, drafting history, and *contemporaneous* legislative history of Section 1005 show that the jurisdiction-stripping provision does not apply to pending habeas petitions.

CONCLUSION

Senator Levin respectfully requests that this Court rule that Subsection 1005(e)(1) does not strip the federal courts of jurisdiction over pending habeas cases.

Dated: March 10, 2006

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), and D.C. Circuit Rule 32(a), that the foregoing brief of Senator Carl Levin is in 14-point, proportionally spaced Times-New Roman Type, and is 2,230 words in length (which does not exceed the applicable 7,000 word limit).

Marci T. Mack
on behalf of Philip Allen Lacovara
Philip Allen Lacovara

Dated: March 10, 2006

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2006, two copies of the foregoing brief of Senator Carl Levin were delivered by overnight mail (or hand-delivered) and were also sent by e-mail transmission, to the following:

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